

1 Todd M. Touton
2 Nevada Bar No. 1744
3 Marla DaVee
4 Nevada Bar No. 11098
5 LIONEL SAWYER & COLLINS
6 1700 Bank of America Plaza
7 300 South Fourth Street
8 Las Vegas, Nevada 89101
9 (702) 383-8888 (Telephone)
10 (702) 383-8845 (Fax)

11 Mark A. Hannemann, *admitted pro hac vice*
12 Jeffrey S. Ginsberg, *admitted pro hac vice*
13 Richard M. Cowell, *admitted pro hac vice*
14 KENYON & KENYON LLP
15 One Broadway
16 New York, NY 10004
17 (212) 425-7200 (Telephone)

18 *Attorneys for Robert Bosch LLC*

19
20 **UNITED STATES DISTRICT COURT**
21 **DISTRICT OF NEVADA**

22 ROBERT BOSCH LLC,
23 Plaintiff,

24 Case No. 2:10-cv-01930-RLH-RJJ

25 v.

26 ADM 21 CO., LTD.; ADM USA; and
27 ADM NORTH AMERICA,

28 Defendants.

29
30 **PLAINTIFF ROBERT BOSCH LLC'S RESPONSIVE**
31 **SUPPLEMENTAL CLAIM CONSTRUCTION BRIEF**

TABLE OF CONTENTS

1	ARGUMENT	1
2	A. Claim Terms From The '218 Patent	2
3	1. "the spoiler has a recess receiving at least one retainer"	2
4	2. "a spoiler having an outer profile"	5
5	3. "at least approximately adapted"	5
6	4. "recess in the spoiler is groove-shaped"	9
7	B. Claim Terms From The '988 Patent	9
8	1. "hinge half"	9
9	2. "considerably shallower"	11
10	3. "by each of which one cheek region is formed on one of two longitudinal sides (44) of the coupling part"	12
11	4. "near one end of the coupling part"	14
12	C. Claim Terms From The '926 Patent	16
13	1. " I_{zz} is a moment of inertia of a cross sectional profile around a z-axis perpendicular to an axis, which adapts along with the support element (12), and perpendicular to a y-axis"	16
14	2. "two individual bars"	17
15	CONCLUSION	19
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

TABLE OF AUTHORITIES

CASES

3	<i>Acumed LLC v. Stryker Corp.</i> , 483 F.3d 800 (Fed. Cir. 2007).....	2, 14
4		
5	<i>AIA Eng’g Ltd. v. Magotteaux Int’l S/A</i> , 657 F.3d 1264 (Fed. Cir. 2011).....	18
6		
7	<i>Anderson v. Int’l Eng’g & Mfg., Inc.</i> , 160 F.3d 1345 (Fed. Cir. 1998).....	10
8		
9	<i>Andrew Corp. v. Gabriel Elec., Inc.</i> , 847 F.2d 819 (Fed. Cir. 1988).....	6
10		
11	<i>Blackboard, Inc. v. Desire2Learn, Inc.</i> , 574 F.3d 1371 (Fed. Cir. 2009).....	4
12		
13	<i>Cent. Admixture Pharmacy Servs., Inc. v. Adv. Cardiac Solutions, P.C.</i> , 482 F.3d 1347 (Fed. Cir. 2007).....	6
14		
15	<i>Comark Commc’s, Inc. v. Harris Corp.</i> , 156 F.3d 1182 (Fed. Cir. 1998).....	2, 14
16		
17	<i>Exxon Research & Eng’g Co. v. United States</i> , 265 F.3d 1371 (Fed. Cir. 2001).....	13
18		
19	<i>Freedom Wireless, Inc. v. Alltel Corp.</i> , Nos. 2:06cv504, 2:06cv505, 2:07cv151, 2:07cv152, 2008 WL 4647270 (E.D. Tex. Oct. 17, 2008)	13
20		
21	<i>General Mills, Inc. v. Hunt-Wesson, Inc.</i> , 103 F.3d 978 (Fed. Cir. 1997).....	15, 18
22		
23	<i>Haemonetics Corp. v. Baxter Healthcare Corp.</i> , 607 F.3d 776 (Fed. Cir. 2010).....	1, 9
24		
25	<i>Halo Elecs., Inc. v. Pulse Eng’g, Inc.</i> , 721 F. Supp. 2d 989 (D. Nev. 2010).....	5, 15, 18
26		
27	<i>Hamilton Prods., Inc. v. O’Neill</i> , 492 F. Supp. 2d 1328 (M.D. Fla. 2007).....	8
28		
29	<i>Hoffer v. Microsoft Corp.</i> , 405 F.3d 1326 (Fed. Cir. 2005).....	13, 14
30		
31	<i>Honeywell Int’l, Inc. v. United States</i> , 609 F.3d 1292 (Fed. Cir. 2010).....	1, 9
32		
33	<i>Amgen, Inc. v. Chugai Pharm. Co.</i> , 927 F.2d 1200 (Fed. Cir. 1991).....	8
34		
35	<i>Int’l Visual Corp. v. Crown Metal Mfg. Co.</i> ,	

1	991 F.2d 768 (Fed. Cir. 1993).....	18
2	<i>Kimberly-Clark Worldwide, Inc. v. First Quality Baby Prods., LLC</i> , No. 1:cv-09-1685, 2011 WL 871479 (M.D. Pa. Mar. 1, 2011)	7
3		
4	<i>Kimberly-Clark Worldwide, Inc. v. First Quality Baby Prods., LLC</i> , No. 1:cv-09-1685, 2011 WL 2632352 (M.D. Pa. July 5, 2011)	8
5		
6	<i>Merck & Co., Inc. v. Teva Pharmas. USA, Inc.</i> , 395 F.3d 1364 (Fed. Cir. 2005).....	6
7		
8	<i>Mondis Tech., Ltd. v. Hon Hai Precision Indus. Co.</i> , No. 2:07-cv-565, 2011 U.S. Dist. LEXIS 7140 (E.D. Tex. Jan. 24, 2011)	7
9		
10	<i>Oakley, Inc. v. Sunglass Hut Int'l</i> , 316 F.3d 1331 (Fed. Cir. 2003).....	6, 11
11		
12	<i>Playtex Prods., Inc. v. Procter & Gamble Co.</i> , 400 F.3d 901 (Fed. Cir. 2005).....	3, 15, 17
13		
14	<i>Power-One, Inc. v. Artesyn Techs., Inc.</i> , 599 F.3d 1343 (Fed. Cir. 2010).....	7
15		
16	<i>Pulse Eng'g, Inc. v. Mascon, Inc.</i> , No. 08-cv-0595, 2009 U.S. Dist. LEXIS 26885 (S.D. Cal. Mar. 9, 2009)	7, 9
17		
18	<i>Quantum Corp. v. Rodime, PLC</i> , 65 F.3d 1577 (Fed. Cir. 1995).....	7
19		
20	<i>Shuffle Master, Inc. v. Awada</i> , No. 2:04-cv-0980, 2007 WL 4166109 (D. Nev. Nov. 16, 2007).....	13, 14
21		
22	<i>Silicon Graphics, Inc. v. ATI Techs., Inc.</i> , 607 F.3d 784 (Fed. Cir. 2010).....	5, 15, 18
23		
24	<i>Source Search Techs., LLC v. Lending Tree, LLC</i> , 588 F.3d 1063 (Fed. Cir. 2009).....	1
25		
26	<i>SRI Int'l v. Matsushita Elec. Corp. of Am.</i> , 775 F.2d 1107 (Fed. Cir. 1985).....	4, 14
27		
28	<i>Synthes (USA) v. Smith & Nephew, Inc.</i> , 547 F. Supp. 2d 436 (E.D. Pa. 2008)	8
23	<i>U.S. Surgical Corp. v. Ethicon, Inc.</i> , 103 F.3d 1554 (Fed. Cir. 1997).....	5
25	<i>W. Union Co. v. Moneygram Int'l, Inc.</i> , No. A-07-CV-372, 2010 U.S. Dist. LEXIS 132700 (W.D. Tex. Aug. 21, 2010).....	7
26	<i>Wellman, Inc. v. Eastman Chem. Co.</i> , 642 F.3d 1355 (Fed. Cir. 2011).....	1, 8, 12, 14

1 Plaintiff Robert Bosch LLC (“Bosch”) submits this Supplemental Claim Construction
 2 brief in response to defendants ADM21 Co. Ltd. and ADM21 Co. (North America) Ltd.
 3 (collectively, “ADM”’s Opening Claim Construction Brief Regarding The ’926, ’218 and ’988
 4 Patents (D.I. 90 (“ADM Br.”)) and in further support of its Supplemental Opening Claim
 5 Construction Brief (D.I. 84 (“Bosch Br.” or “Opening Brief”)) of proposed claim constructions
 6 with respect to United States Patent Nos. 6,523,218 (“the ’218 patent”), 6,611,988 (“the ’988
 7 patent”), and 6,836,926 (“the ’926 patent”).¹

8 **ARGUMENT**

9 ADM argues that many of the claim terms discussed are indefinite. ADM’s positions
 10 lack merit. Indeed, to prove a claim term indefinite, and thus prove the claim invalid, an accused
 11 infringer must prove by clear and convincing evidence that the claim term is insolubly
 12 ambiguous. *See Haemonetics Corp. v. Baxter Healthcare Corp.*, 607 F.3d 776, 783 (Fed. Cir.
 13 2010); *Source Search Techs., LLC v. Lending Tree, LLC*, 588 F.3d 1063, 1076 (Fed. Cir. 2009).
 14 “Thus, [a]n accused infringer must . . . demonstrate by clear and convincing evidence that one of
 15 ordinary skill in the relevant art could not discern the boundaries of the claim based on the claim
 16 language, the specification, the prosecution history, and the knowledge in the relevant art.”
 17 *Wellman, Inc. v. Eastman Chem. Co.*, 642 F.3d 1355, 1366 (Fed. Cir. 2011) (quoting
 18 *Haemonetics Corp.*, 607 F.3d at 783 (alterations in original)). “If the meaning of the claim is
 19 discernible, even though the task may be formidable and the conclusion may be one over which
 20 reasonable persons will disagree, we have held the claim sufficiently clear to avoid invalidity on
 21 indefiniteness grounds.” *Honeywell Int’l, Inc. v. United States*, 609 F.3d 1292, 1301 (Fed. Cir.
 22 2010) (citation omitted).

23 As discussed below, all of the claim terms are readily amenable to construction—indeed,
 24 many of the terms are easily understandable and can be applied by the jury without
 25
 26

27 ¹ Citations to Ex. A–I refer to the exhibits to Bosch’s Supplemental Opening Claim
 28 Construction Brief (D.I. 84); citations to Ex. J–M refer to the exhibits submitted with this brief.

1 construction—and ADM has failed to produce the clear and convincing evidence needed to meet
 2 the “exacting standard” required to prove them indefinite.²

4 A. **Claim Terms From The ’218 Patent**

5 1. **“the spoiler has a recess receiving at least one retainer”**

Claim	Bosch’s Proposed Construction	ADM’s Proposed Construction
1	No construction is necessary.	the spoiler has a recess receiving at least one retainer; the recess is not an aperture or hole, but merely an indentation

10 ADM argues that the term “recess” must be negatively defined as “not an aperture or
 11 hole, but merely an indentation.” ADM’s construction relies on a passage in the specification
 12 that states that “it is *possible* for this spoiler to be formed integrally and economically onto the
 13 wiper strip” (ADM. Br. at 10 (citing the ’218 patent (Ex. A) at 1:37–42 (emphasis added))). In
 14 support of its arguments ADM relies on out-of-context portions of the specification and an
 15 improper reading of the prosecution history.

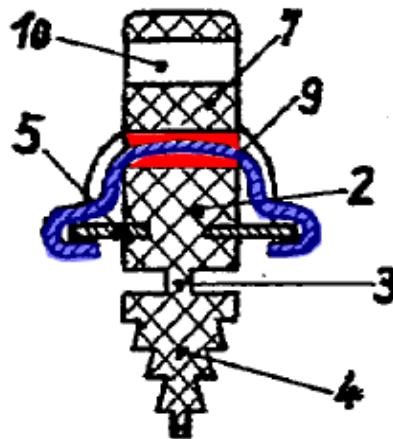
16 ADM first argues that the specification’s description of, and figures depicting, preferred
 17 embodiments, justifies limiting “recess” (ADM Br. at 9–10). ADM’s position runs contrary to
 18 the case law. *See Comark Commc’ns, Inc. v. Harris Corp.*, 156 F.3d 1182, 1187 (Fed. Cir. 1998)
 19 (“the language that Harris [the defendant] argues should limit claim 1 is clearly found in the . . .
 20 patent’s description of the preferred embodiment. It is precisely against this type of claim
 21 construction that our prior case law counsels.”); *see also Acumed LLC v. Stryker Corp.*, 483 F.3d
 22 800, 807–08 (Fed. Cir. 2007) (rejecting defendant’s proposed construction as “an improper
 23 attempt to read a feature of the preferred embodiment into the claims as a limitation”).

24 2 An accused infringer’s argument that a claim is indefinite does not prevent the court from
 25 holding that the term can be applied by the jury without construction. *E.g., Pulse Eng’g, Inc. v.*
Mascon, Inc., No. 08-cv-0595, 2009 U.S. Dist. LEXIS 26885, at *12–18 (S.D. Cal. Mar. 9,
 26 2009) (holding claim terms not indefinite and not requiring construction); *Mondis Tech., Ltd. v.*
Hon Hai Precision Indus. Co., No. 2:07-cv-565, 2011 U.S. Dist. LEXIS 7140, at *83–84 (E.D.
 27 Tex. Jan. 24, 2011) (claim term was not indefinite and did not require construction); *W. Union*
Co. v. Moneygram Int’l, Inc., No. A-07-CA-372, 2010 U.S. Dist. LEXIS 132700, at *11–12
 28 (W.D. Tex. Aug. 21, 2010) (same).

Moreover, the language from the specification on which ADM relies does not support limiting the definition of recess. For example, ADM does not explain how the fact that the recesses are sometimes described as being “groovelike” requires them to be indentations in the spoiler, (*see* ADM Br. at 9–10 (citing the ’218 patent (Ex. A) at 2:9, 4:61)). In addition, the description of the recesses as “oriented transversely to the length of the wiper strip” similarly does not imply or require that the recesses be indentations (*see id.* (citing the ’218 patent (Ex. A) at 4:10–11)). Indeed, the words “indentation,” “hole” and “aperture” are not found anywhere in the ’218 patent’s specification. And, while the invention does allow for the spoiler to be formed integrally with the wiper strip, claim 1 includes no such limitation. Figure 7, cited by ADM, similarly does not evince any disclaimer of scope. *Playtex Prods., Inc. v. Procter & Gamble Co.*, 400 F.3d 901, 907–08 (Fed. Cir. 2005) (rejecting district court’s claim construction because “By its reliance on the figures, the district court improperly limited claim 1 to a preferred embodiment”); *see also MBO Labs., Inc. v. Becton, Dickinson & Co.*, 474 F.3d 1323, 1333–34 (Fed. Cir. 2007) (“patent coverage is not necessarily limited to inventions that look like the ones in the figures. To hold otherwise would be to import limitations onto the claim from the specification, which is fraught with ‘danger.’ Limiting claims from the specification is generally not permitted absent a clear disclosure that the patentee intended the claims to be limited as shown.” (internal citations omitted)).

ADM also cites to an interview summary in the prosecution history of the ’218 patent, in which the German Hoyler reference was discussed, to support its limiting construction (ADM Br. at 11).³ ADM is misguided. In the summary, the Examiner noted that the recess set forth in claim 1 was not “an aperture or hole *as is shown by Hoyler.*” Ex K, Interview Summary, at BOS_LLC0812962 (emphasis added). The “aperture or hole” as shown by Hoyler is located in the upper portion of a wiper blade, *i.e.*, it is a void surrounded on all sides by the wiper blade; it is not an aperture or hole in a spoiler. Fig. B-B from Hoyler shows a “retainer,” highlighted in blue, passing through this hole, highlighted in red:

³ Ex. J, German Patent DE 1 028 896.



Schnitt B-B

(Ex. J, DE 1 028 896 at Fig. B-B). The Examiner also noted that “the upper portion of the blade of Hoyler *can not fairly be considered to be a spoiler* in the sense of an airfoil employed to decrease lift” (Ex. L, Examiner’s Amendment and Reasons for Allowance, at BOS_LLC0813070 (emphasis added)). Indeed, the wiper blade described in Hoyler is a conventional bracketed blade, not a flat blade with a spoiler as described and claimed in the ’218 patent.

The Examiner’s statement thus says nothing about the definition of a recess in reference to a spoiler nor does it provide any support for ADM’s construction that the recess is “merely an indentation.” Accordingly, ADM’s construction should be rejected. *See Blackboard, Inc. v. Desire2Learn, Inc.*, 574 F.3d 1371, 1377 (Fed. Cir. 2009) (holding that an Examiner’s statements that do not bear on a disputed term are irrelevant).

In urging that the Court adopt its construction, ADM discusses the purported differences between its accused products and the claims of the ’218 patent making clear that the motivation behind ADM’s position is to set up a non-infringement defense at trial. Such comparison is impermissible at the claim construction stage. *See SRI Int’l v. Matsushita Elec. Corp. of Am.*, 775 F.2d 1107, 1118 (Fed. Cir. 1985) (*en banc*) (“It is only *after* the claims have been construed without reference to the accused device that the claims, as so construed, are applied to the accused device to determine infringement.” (emphasis in original)).

Since ADM’s construction would import limitations from preferred embodiments in the specification and figures, and relies on irrelevant sections of the prosecution history, it should be

1 discarded. As ADM does not dispute that the term is otherwise understandable by the jury
 2 without construction, the Court should decline to construe it. *E.g., Silicon Graphics, Inc. v. ATI*
 3 *Techs., Inc.*, 607 F.3d 784, 798 (Fed. Cir. 2010) (affirming district court’s choice to not construe
 4 term and apply its ordinary meaning); *Halo Elecs., Inc. v. Pulse Eng’g, Inc.*, 721 F. Supp. 2d
 5 989, 1004 (D. Nev. 2010) (holding that a claim term should be given its ordinary meaning and
 6 did not require construction); *see also U.S. Surgical Corp. v. Ethicon, Inc.*, 103 F.3d 1554, 1568
 7 (Fed. Cir. 1997) (claim construction “is not an obligatory exercise in redundancy”).

8 **2. “a spoiler having an outer profile”**

Claim	Bosch’s Proposed Construction	ADM’s Proposed Construction
1	No construction is necessary	a spoiler having an outer surface shaped so as to prevent the wiper blade from lifting away from the window

13 ADM seeks to define the simple term “profile” as “surface shaped so as to prevent the
 14 wiper blade from lifting away from the window” (ADM Br. at 12). The sections of the
 15 specification cited by ADM do not support its proposed construction. Column 1, lines 26–29 of
 16 the ’218 patent describes the prior art and does not discuss the shape of a spoiler’s outer profile.
 17 Similarly, column 1, lines 42–46 does not impose a requirement on the shape of the spoiler’s
 18 profile, but merely reiterates claim 1’s requirement that at least one retainer be at least
 19 approximately adapted to that shape.

20 Since ADM’s construction would import limitations from inapplicable sections of the
 21 specification, it should be rejected. Moreover, as the term is readily understandable and able to
 22 be applied by the jury without construction, the Court should decline to construe this term.
Silicon Graphics, 607 F.3d at 798; *Halo Elecs.*, 721 F. Supp. 2d at 1004.

24 **3. “at least approximately adapted”**

Claim	Bosch’s Proposed Construction	ADM’s Proposed Construction
1	No construction is necessary	indefinite

1
2 As noted in Bosch's Opening Brief, (*see* D.I. 84 at 5–6), the term "at least approximately
3 adapted" is clear and can be applied by the jury without construction. Indeed, the Federal Circuit
4 has repeatedly found approximation language to not be indefinite and, in many cases, has used
5 the word "approximately" as a construction. *See, e.g., Merck & Co., Inc. v. Teva Pharmas. USA,*
6 *Inc.*, 395 F.3d 1364, 1369 (Fed. Cir. 2005) (holding that "about" "should be given its ordinary
7 meaning of 'approximately'"); *Andrew Corp. v. Gabriel Elec., Inc.*, 847 F.2d 819, 822 (Fed. Cir.
8 1988) (holding that the term "closely approximate" was not indefinite). Moreover, it is not
9 necessary for a patentee to "define his invention with mathematical precision in order to comply
10 with the definiteness requirement." *Oakley, Inc. v. Sunglass Hut Int'l*, 316 F.3d 1331, 1341
11 (Fed. Cir. 2003) (citing *In re Marosi*, 710 F.2d 799, 802-03 (Fed. Cir. 1983)). ADM has
12 provided no evidence that one of skill in the art would not understand the meaning of "at least
13 approximately adapted" and thus has failed to prove the term indefinite. Indeed, Bosch's expert,
14 Dr. Steven Dubowsky, found that the term, read in light of the surrounding claim language and
15 the specification, is easily understandable and requires no construction (Dubowsky Dec. at ¶¶ 5–
16 8)⁴.

17 ADM argues that the claim term is indefinite because it uses what ADM describes as
18 "three serial terms of approximation" (ADM Br. at 13). ADM's argument lacks merit. First,
19 "adapted" is not a term of approximation. *E.g., Cent. Admixture Pharmacy Servs., Inc. v. Adv.*
20 *Cardiac Solutions, P.C.*, 482 F.3d 1347, 1356 (Fed. Cir. 2007) (holding that phrase "adapted to
21 be diluted" did not possess "any significant ambiguity, much less intractable ambiguity making
22 the claim 'not amenable to construction,' which is the requirement to demonstrate
23 indefiniteness" (citation omitted)). The Federal Circuit has held that "Claims using relative
24 terms such as 'near' or 'adapted to' are insolubly ambiguous only if they provide no guidance to
25 those skilled in the art as to the scope of that requirement." *Power-One, Inc. v. Artesyn Techs.*,

26
27

⁴ Citations to "Dubowsky Dec." refer to the declaration of Dr. Steven Dubowsky, filed
28 contemporaneously herewith.

1 *Inc.*, 599 F.3d 1343, 1348 (Fed. Cir. 2010). As noted below, the specification of the '218 patent
 2 provides guidance as to the meaning of the term "adapted" (*e.g.*, Ex. A at 4:18–25).

3 Second, the use of "at least" in this context is not ambiguous. The use of "at least" is to
 4 set a minimum level. *E.g.*, *Quantum Corp. v. Rodime, PLC*, 65 F.3d 1577, 1581 (Fed. Cir.
 5 1995). Obviously, the maximum level of adaptation here would be a retainer that was exactly
 6 adapted to the spoiler's outer profile.

7 Finally, as noted above, the word "approximately" is not ambiguous. Read in context,
 8 the term simply means what it says, that the retainer is of similar shape to the spoiler. There is
 9 no need for a construction here, as the language of the claim itself is perfectly understandable.
 10 *E.g.*, *Pulse Eng'g, Inc. v. Mascon, Inc.*, No. 08-cv-0595, 2009 U.S. Dist. LEXIS 26885, at *12–
 11 18 (S.D. Cal. Mar. 9, 2009) (holding claim terms not indefinite and not requiring construction);
 12 *Mondis Tech., Ltd. v. Hon Hai Precision Indus. Co.*, No. 2:07-cv-565, 2011 U.S. Dist. LEXIS
 13 7140, at *83–84 (E.D. Tex. Jan. 24, 2011) (claim term was not indefinite and did not require
 14 construction); *W. Union Co. v. Moneygram Int'l, Inc.*, No. A-07-CV-372, 2010 U.S. Dist. LEXIS
 15 132700, at *11–12 (W.D. Tex. Aug. 21, 2010) (same).

16 Indeed, the specification makes clear that the retainer is "at least approximately adapted"
 17 to the shape of the spoiler by having a similar cross-section.

18 In the region of the spoiler 23, the **retainers 36–40 have a cross section**
 19 **that substantially coincides with the cross section of the spoiler 23.** Each retainer is accordingly also provided with a leading-edge throat 44
 20 against which the relative wind 25 blows. **Seen in cross section,** accordingly, each retainer 36–40 has a profile, in the region of the
 21 spoiler, that is at least approximately adapted to the profile of the spoiler.

22 (Ex. A at 4:18–25) (emphasis added). The term does not require construction.

23 The cases cited by ADM do not compel a different conclusion. For example, the court in
 24 *Kimberly-Clark Worldwide, Inc. v. First Quality Baby Prods., LLC*,⁵ while originally finding the
 25 claim terms using the language "at least about" to be indefinite, eventually granted
 26 reconsideration and held that the term was not indefinite. *Kimberly-Clark Worldwide, Inc. v.*

27
 28 ⁵ No. 1:cv-09-168, 2011 WL 871479 (M.D. Pa. Mar. 1, 2011).

First Quality Baby Prods., LLC, No. 1:cv-09-1685, 2011 WL 2632352, at *1-2 (M.D. Pa. July 5, 2011) (“Thus, we will construe ‘at least about’ found in claims 1, 8, 9, 20, and 41 to mean ‘equal to or greater than approximately.’”).⁶ In *Amgen, Inc. v. Chugai Pharm. Co.*, 927 F.2d 1200, 1217–18 (Fed. Cir. 1991), the court specifically noted that its indefiniteness holding concerning the term “about 160,000” was based on the existence of “close prior art” that had been specifically distinguished during prosecution. The court also specifically noted that its holding was based on the facts of the case and cautioned “that our holding that the term ‘about’ renders indefinite claims 4 and 6 should not be understood as ruling out any and all uses of this term in patent claims.” *Id.* at 1218. In *Hamilton Prods., Inc. v. O’Neill*, 492 F. Supp. 2d 1328, 1338-41 (M.D. Fla. 2007), the court’s holding was based on voluminous evidence, including inventor and expert testimony, that supported a finding that the limitation at issue, the dimensions of a universal seatbelt buckle, were “particularly critical to its validity, because it is undisputed that those dimensions are what made it patentable.” In a similar vein, the court in *Synthes (USA) v. Smith & Nephew, Inc.*, 547 F. Supp. 2d 436 (E.D. Pa. 2008), invalidated claims incorporating the term “less than about 2%” because the term was directed to an essential feature of the patented invention. *Id.* at 454 (“The ratio of the studs or bone contact area to the area of the plate’s lower surface is a crucial aspect of the invention in the ’036 patent, which is directed specifically towards a plate that minimizes bone contact. The phrase ‘less than about 2%’ is clearly directed at that essential feature, yet it is impossible to tell exactly what constitutes ‘about 2%.’”).

ADM has provided no evidence that the term “at least approximately adapted” could not be understood by one of skill in the art. Accordingly, the Court should therefore decline to find the term “at least approximately adapted” indefinite. *Wellman, Inc.*, 642 F.3d at 1366 (“Thus, an accused infringer must demonstrate by clear and convincing evidence that one of ordinary skill in the relevant art could not discern the boundaries of the claim based on the claim language, the specification, the prosecution history, and the knowledge in the relevant art.” (quoting

⁶ It is also worthy of note that the *Kimberly-Clark* court used “approximately” as a construction for “about,” rendering it unlikely that the same court would find “approximately” indefinite, as ADM argues.

1 *Haemonetics*, 607 F.3d at 783)); *Honeywell*, 609 F.3d at 1301 (“If the meaning of the claim is
 2 discernible, even though the task may be formidable and the conclusion may be one over which
 3 reasonable persons will disagree, we have held the claim sufficiently clear to avoid invalidity on
 4 indefiniteness grounds.” (citation omitted)); *Pulse Eng’g*, No. 08-cv-0595, 2009 U.S. Dist.
 5 LEXIS 26885, at *12–18 (holding claim terms not indefinite and not requiring construction).

6 **4. “recess in the spoiler is groove-shaped”**

Claim	Bosch’s Proposed Construction	ADM’s Proposed Construction
6	No construction is necessary	recess in the spoiler is groove-shaped and is not an aperture or hole, but merely an indentation

10 As noted in Bosch’s Opening Brief (D.I. 84 at 6), ADM agrees that this term is
 11 understandable, but repeats its arguments and construction with respect to the word “recess.” As
 12 discussed above, ADM’s arguments are without merit and should be rejected (*see* Section A.1,
 13 *supra*).
 14

15 **B. Claim Terms From The ’988 Patent**

16 **1. “hinge half”**

Claim	Bosch’s Proposed Construction	ADM’s Proposed Construction
1	portion of the coupling part formed by the bearing recess	the one of the two coupling part halves in which the entire bearing recess is formed

21 ADM’s proposed construction for “hinge half” (i) reads a limitation into claim 1 of the
 22 ’988 patent based on an extrinsic dictionary definition for the term “half,” and (ii) includes an
 23 additional unsupported limitation that “the entire bearing recess” must be formed therein.
 24

25 As noted in Bosch’s Opening Brief, there is no discussion in the specification of a second
 26 coupling part half or that the bearing recess is required to be entirely within the hinge half
 27 (Bosch Br. at 6–7). ADM states that “the ‘hinge half’ is repeatedly referenced throughout the
 28 specification as having a hinge axis” (ADM Br. at 15 (citing the ’988 patent (Ex. B) at 1:51–52;

1 4:35–37)). ADM’s citations appear to be incorrect as the words “hinge axis” do not appear in the
 2 cited sections. Nonetheless, ADM’s argument that the “hinge half” includes a “hinge axis”
 3 supports Bosch’s construction, which construes “hinge half” as the portion of the coupling part
 4 formed by the bearing recess.⁷ (Bosch Br. at 6–7).

5 ADM’s proposed construction misinterprets the coupling part as having both a hinge half
 6 and an “other half” (ADM Br. at 16). However, hinge half, as used in claim 1 of the ’218 patent
 7 describes half of a hinge, not half of the coupling part as ADM argues. The coupling part
 8 includes a single hinge half, with the other hinge half being embodied on the wiper arm (Ex. B.
 9 at 1:20–23 (describing both the “hinge half” of the coupling part, the term at issue here, and the
 10 separate “hinge half of the wiper arm,” which is not at issue)).

11 In support of its construction, ADM relies on an extrinsic dictionary definition of the
 12 word “half” (ADM Br. at 16). However, ADM’s own definition injects ambiguity as to whether
 13 “half” must mean equal portions or simply portions of an item (*see D.I. 91 Ex. 7* (defining “half”
 14 as, among other things, “Partial or incomplete,” “Not entirely or sufficiently,” “A part of
 15 something approx. equal to the remainder”)). None of the definitions cited by ADM require two
 16 halves to be on the coupling part. Other dictionaries evince similar definitions at odds with
 17 ADM’s construction (though not Bosch’s). *E.g.*, Ex. M, Webster’s Third New International
 18 Dictionary at 1021 (defining “half” as, among others, “a part of a thing equal approximately
 19 equal to the remainder” or “a sizable portion”). ADM’s construction, which requires two
 20 “halves,” both on the coupling part, is unsupported by the intrinsic evidence and relies on an
 21 ambiguous, extrinsic dictionary definition of “half.” *See Anderson v. Int’l Eng’g & Mfg., Inc.*,
 22 160 F.3d 1345, 1348–49 (Fed. Cir. 1998) (“dictionary definitions of ordinary words are rarely
 23 dispositive of their meaning in a technological context. A word describing patented technology
 24 takes its definition from the context in which it was used by the inventor.”).

25

26

27 ⁷ The descriptions of the figures, which do mention “hinge axis,” show such axis generally
 28 being projected from the bearing recess. *E.g.*, Ex. B at Figs. 1, 2, 4 (hinge axis is identified by
 numeral 52); 5:20–22; 6:1.

1 Further, ADM does not provide any support for its proposed limitation that “the entire
 2 bearing recess” must be formed in the hinge half (*see generally* ADM Br. at 15–16).
 3 Accordingly, the Court should decline to adopt ADM’s construction and accept Bosch’s
 4 construction.

5 **2. “considerably shallower”**

Claim	Bosch’s Proposed Construction	ADM’s Proposed Construction
1	visibly lower	indefinite

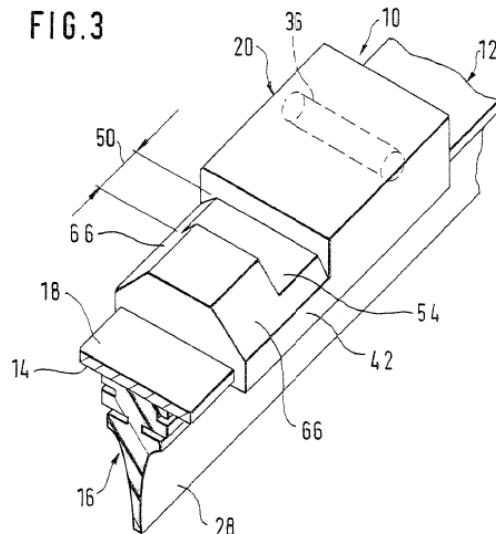
8 ADM argues that “considerably shallower” is unable to be construed because neither
 9 “considerably” nor “shallower”⁸ can be understood and because the patent does not define “a
 10 ratio of the difference in thickness between the shallower portion and the other portion in the
 11 claimed coupling part” (ADM Br. at 17–18). As set forth above, it is not necessary for a
 12 patentee to “define his invention with mathematical precision in order to comply with the
 13 definiteness requirement.” *Oakley*, 316 F.3d at 1341 (citation omitted). Indeed, ADM provides
 14 no evidence that one of skill in the art would be unable to understand the term.

15 As noted in Bosch’s Opening Brief, the figures of the patent show the difference in
 16 thickness between the shallower portion and the rest of the coupling part (Bosch Br. at 7 (citing
 17 Ex. B at Fig. 3; 5:12–15)). One of skill in the art would have no trouble discerning that the
 18 shallower portion (denoted by reference numeral 50) is visibly lower than the remainder of the
 19 coupling part.

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 21
 22
 23
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 25
 26
 27

⁸ ADM argues, citing no support, that “shallower” is a term of approximation. Of course it
 28 is not; shallower simply means “more shallow”; *i.e.*, having less depth.

FIG. 3



ADM provides no support for its argument that “considerably shallower” is indefinite. Instead, it argues, again relying on extrinsic evidence, that a dictionary definition of “considerably” is at odds with Bosch’s proposed construction of “visibly lower” (ADM Br. at 17–18). However, even if the Court were to accept ADM’s argument that “considerably” must mean “large in amount, extent or degree,” Bosch’s construction is still appropriate. As the item being considered is small in size, on the order of between 16–25 mm wide and of a similar order in height (*see Ex. B at 2:8–10*), “visibly” is an appropriate definition for considerably.

ADM has provided no support that the limitation “considerably shallower” is insolubly ambiguous and the Court, to the extent it deems construction necessary, should adopt Bosch’s construction. *See Wellman, Inc.*, 642 F.3d at 1366–68.

3. “by each of which one cheek region is formed on one of two longitudinal sides (44) of the coupling part”

Claim	Bosch’s Proposed Construction	ADM’s Proposed Construction
2	each side region is formed on one of two longitudinal sides of the coupling part	indefinite

ADM argues that the phrase “by each of which one cheek region is formed on one of two longitudinal sides (44) of the coupling part” is insolubly ambiguous and incapable of construction (ADM Br. at 18–19). ADM is incorrect—Bosch’s construction provides the clarification that “each side region is formed on one of two longitudinal sides of the coupling

1 part.” This clarification is apparent from the face of the patent (Ex. B at 4:45–48; Fig. 3) and
 2 there is no other plausible meaning for the term (*see also* Bosch Br. at 8). *Hoffer v. Microsoft*
 3 *Corp.*, 405 F.3d 1326, 1331 (Fed. Cir. 2005) (reversing summary judgment of invalidity for
 4 indefiniteness based on typographical error where “the error was apparent from the face of the
 5 patent, and that view is not contradicted by the prosecution history”); *Exxon Research & Eng’g*
 6 *Co. v. United States*, 265 F.3d 1371, 1375 (Fed. Cir. 2001) (“If the meaning of the claim is
 7 discernible, even though the task may be formidable and the conclusion may be one over which
 8 reasonable persons will disagree, we have held the claim sufficiently clear to avoid invalidity on
 9 indefiniteness grounds.”); *Freedom Wireless, Inc. v. Alltel Corp.*, Nos. 2:06cv504, 2:06cv505,
 10 2:07cv151, 2:07cv152, 2008 WL 4647270, at *13 (E.D. Tex. Oct. 17, 2008) (rejecting argument
 11 that typographical error rendered claim indefinite); *Shuffle Master, Inc. v. Awada*, No. 2:04-cv-
 12 0980, 2007 WL 4166109, at *10 (D. Nev. Nov. 16, 2007) (construing claim to correct
 13 typographical error).

14 ADM argues that no correction is possible because there are two potential fixes to the
 15 language (ADM Br. at 18–19).⁹ However, both potential corrections arrive at the same meaning,
 16 that each side region is formed on one of two longitudinal sides of the coupling part. Indeed,
 17 ADM’s own brief says as much—ADM’s identified corrections lead to, according to ADM, a
 18 limitation that reads either “each cheek region is formed on one of two longitudinal sides,” or
 19 “one cheek region is formed on one of two longitudinal sides” (ADM Br. at 19). These are,
 20 respectively, Bosch’s proposed construction¹⁰ and a construction that is essentially the same.

21 Moreover, the intrinsic evidence makes it clear that each cheek region is formed on one
 22 of the two longitudinal sides (*see* Ex. B at 4:45–48 (“one cheek region is disposed on each of the
 23 two long sides of the coupling part”); Figs. 3, 4). ADM ignores this clear statement in the
 24 specification.

25

26 ⁹ According to ADM, one can either “delete ‘by’ and ‘of which’” or “by each of which”
 27 (ADM Br. at 19).

28 ¹⁰ The only difference is that “cheek region” is substituted with “side region” per the
 parties’ agreed-upon construction of “cheek region” (*see* Bosch Br. at 7).

Because Bosch's construction is appropriate and supported by the specification and because ADM has failed to carry its burden to show the claim is indefinite, the Court should adopt Bosch's construction. *See Wellman, Inc.*, 642 F.3d at 1366–68; *Hoffer*, 405 F.3d at 1331; *Shuffle Master*, 2007 WL 4166109 at *10.

4. “near one end of the coupling part”

Claim	Bosch's Proposed Construction	ADM's Proposed Construction
11	no construction necessary; alternatively, if construction is deemed necessary, “in the vicinity of one end of the coupling part”	close to one longitudinal end of the coupling part and closer to that end than to the other longitudinal end of the coupling part

ADM's proposed construction of the phrase “near one end of the coupling part” improperly reads in a limitation—requiring the bearing recess to be *closer* to one end of the coupling part than the other—from a preferred embodiment described in the specification. ADM Br. at 19–22.¹¹ *See Comark Commc'ns*, 156 F.3d at 1187 (“the language that Harris [the defendant] argues should limit claim 1 is clearly found in the . . . patent's description of the preferred embodiment. It is precisely against this type of claim construction that our prior case law counsels.”); *see also Acumed*, 483 F.3d at 807–08 (rejecting defendant's proposed construction as “an improper attempt to read a feature of the preferred embodiment into the claims as a limitation”).

The claim language “near one end of the coupling part” does not discuss any relation to another end. ADM first argues that “near” taken by itself must mean, essentially, “nearer” (ADM Br. at 19–20). However, ADM does not identify any support for that position.

The specification language ADM does identify as supporting its position similarly does not require that “near one end” means “closer to that end than to the other longitudinal end”

¹¹ ADM acknowledges that its motivation for seeking its proposed construction is to read in a limitation in an attempt to set up a non-infringement argument for trial (*see* ADM Br. at 21–22 (describing and showing ADM's accused products)). *SRI Int'l*, 775 F.2d at 1118 (“It is only *after* the claims have been *construed without reference to the accused device* that the claims, as so construed, are applied to the accused device to determine infringement.” (emphasis in original)).

1 (ADM Br. at 20)—the cited passage merely makes clear that there are two ends, at least one of
 2 which is near (Ex. B at 1:26–33).

3 ADM also argues that rejecting its construction would allow any bearing recess to meet
 4 the claim (ADM Br. at 20). ADM is incorrect—the recess is required to be near at least one end
 5 of the coupling part to meet the limitation.

6 The remainder of ADM’s argument relies on the figures, which generally show the
 7 bearing recess closer to one end than the other. However, absent a clear disclaimer, the figures
 8 do not limit the scope of the claims. “Claims of a patent may only be limited to a preferred
 9 embodiment by the express declaration of the patentee, and there is no such declaration here.”
 10 *Playtex Prods., Inc.*, 400 F.3d at 907–08 (rejecting district court’s claim construction because
 11 “By its reliance on the figures, the district court improperly limited claim 1 to a preferred
 12 embodiment”); *see also MBO Labs.*, 474 F.3d at 1333–34 (“patent coverage is not necessarily
 13 limited to inventions that look like the ones in the figures. To hold otherwise would be to import
 14 limitations onto the claim from the specification, which is fraught with ‘danger.’ Limiting claims
 15 from the specification is generally not permitted absent a clear disclosure that the patentee
 16 intended the claims to be limited as shown.” (internal citations omitted)). ADM points to no
 17 disclaimer let alone a clear disclaimer that the patentee intended to limit the claims to the
 18 drawings. ADM’s proposed construction should therefore be rejected.

19 Since the claim term “the bearing bore is disposed in the coupling part near one end
 20 thereof” is easily understandable, it can be applied by the jury without construction. *Silicon*
 21 *Graphics*, 607 F.3d at 798; *Halo Elecs.*, 721 F. Supp. 2d at 1004. Accordingly, no construction
 22 is necessary. Alternatively, Bosch’s construction, “in the vicinity of one end of the coupling
 23 part” appropriately sets forth the meaning of the term based on the intrinsic evidence (*see* Ex. B
 24 at 4:31–33). *See General Mills, Inc. v. Hunt-Wesson, Inc.*, 103 F.3d 978, 981 (Fed. Cir. 1997)
 25 (“To ascertain the meaning of, or construe, patent claims, the intrinsic evidence of record should
 26 be considered first, i.e., the patent itself, including the claims, the specification, and the
 27 prosecution history.” (citation omitted)).

28

1 C. **Claim Terms From The '926 Patent**

2 1. **" I_{zz} is a moment of inertia of a cross sectional profile around a z-axis
3 perpendicular to an s-axis, which adapts along with the support
4 element (12), and perpendicular to a y-axis"**

Claim	Bosch's Proposed Construction	ADM's Proposed Construction
1	I_{zz} is a moment of inertia of a cross sectional profile around a z-axis perpendicular to an s-axis which adapts along with the support element, and perpendicular to a y-axis	I_{zz} is the moment of inertia of the cross sectional profile around the z-axis, wherein the z-axis is perpendicular to 1) the s-axis, which adapts along with the support element and 2) the y-axis, and wherein the orientation of the z-axis and the orientation of the y-axis are shown [sic] in Figure 4 and Figure 5.

11 ADM argues that the phrase " I_{zz} is a moment of inertia of a cross sectional profile around
12 a z-axis perpendicular to an [s-axis], which adapts along with the support element (12), and
13 perpendicular to a y-axis" limits the moment of inertia, I_{zz} , to the particular axes shown in the
14 figures (ADM Br. at 4–5).¹² ADM further argues that because the figures only show one
15 configuration, the claims are limited to that understanding of the axes. But the claims do not
16 limit what "a z-axis" and a "y-axis" can be, other than that both must be perpendicular to the s-
17 axis. ADM's attempt to impose this limitation impermissibly imports limitations from the
18 figures. *MBO Labs.*, 474 F.3d at 1333–34 ("patent coverage is not necessarily limited to
19 inventions that look like the ones in the figures. To hold otherwise would be to import limitations
20 onto the claim from the specification, which is fraught with 'danger.' Limiting claims from the
21 specification is generally not permitted absent a clear disclosure that the patentee intended the
22 claims to be limited as shown." (internal citations omitted)).

23 ADM argues that without its construction, the limitation would be meaningless and,
24 presumably, one would be unable to calculate I_{zz} . However, the specification teaches exactly
25 how to calculate I_{zz} for the situation where the support element has a substantially rectangular

27 ¹² The parties agree that "taxis" is a typographical error and should read "s-axis." ADM Br.
28 at 4.

1 cross-section and substantially constant width and thickness—the only configuration covered by
 2 claim 1. Specifically, I_{zz} is calculated by the formula:

$$I_{zz} = \frac{d * b^3}{12}$$

5 where d is the thickness of the support element and b is the width of the support element (Ex. C
 6 at 6:58–7:1). Indeed, claim 1 of the '926 patent specifically references the “d” and “b” elements
 7 of the above equation (Ex. C at 10:23–24 (describing the support element’s cross-section as
 8 having “a substantially constant width b and a substantially constant thickness d”). One of skill
 9 in the art would recognize this equation as the equation for calculating a moment of inertia in the
 10 direction of the z-axis, that is, horizontally to the support element, and would have no need of
 11 axis labels (see Dubowsky Decl. ¶¶ 9–16).

12 As ADM’s construction impermissibly imports limitations from the specification and
 13 figures, it should be discarded. *Playtex*, 400 F.3d at 907–08 (rejecting district court’s claim
 14 construction because “By its reliance on the figures, the district court improperly limited claim 1
 15 to a preferred embodiment”).

17 **2. “two individual bars”**

Claim	Bosch’s Proposed Construction	ADM’s Proposed Construction
19 3	no construction necessary; alternatively, if 20 construction is deemed necessary, two bars separated at least in part by a space	two distinct and separate bars

21
 22 ADM argues that Fig. 5 of the '926 patent supports its overly limiting construction of the
 23 phrase “two individual bars (ADM Br. at 7–8). But Fig. 5, as discussed in Bosch’s Opening
 24 Brief, shows a cross-section of the support element—there is no support in that figure for ADM’s
 25 construction that the two individual bars be “distinct and separate” (Bosch Br. at 11–12). The
 26 specification, which states that the individual bars are “divided into two separate spring bars 42
 27 and 44 as shown in Fig. 5” (Ex. C at 7:10–11), also does not support ADM’s attempt to make the
 28 bars “distinct.” If anything, it supports Bosch’s construction that the bars be separated at least in

1 part by a space. Similarly, ADM's extrinsic evidence, a dictionary definition of "individual,"
 2 does not imply that the bars be totally distinct.

3 ADM also relies on the extrinsic evidence¹³ in the form of deposition testimony of Peter
 4 De Block, the inventor of the '926 patent and a native Dutch speaker, to support its position. But
 5 Mr. De Block was not asked what was meant by "two individual bars" as used in the '926 patent.
 6 Instead, Mr. De Block was shown one of ADM's accused products and asked, without reference
 7 to the patent, if the support element was "a single piece of metal, as opposed to two individual
 8 bars." (D.I. 91 Ex. 8, De Block Tr. 340:15–20). Bosch's counsel objected quite appropriately,
 9 as a), the question was compound (asking both if the element was a single piece of metal, and
 10 whether the element was two individual bars); b) it sought a legal conclusion as to infringement;
 11 and c) it misleadingly did not reference what "two individual bars" meant in the context of the
 12 patent.¹⁴

13 The remainder of ADM's argument consists of comparing its product to Bosch's (ADM
 14 Br. at 8–9). The structure of either product is irrelevant to claim construction. *Int'l Visual Corp.*
 15 v. *Crown Metal Mfg. Co.*, 991 F.2d 768, 771–72 (Fed. Cir. 1993) (reversing summary judgment
 16 of non-infringement because district court's claim construction was based on patentee's
 17 product); *SRI Int'l*, 775 F.2d at 1118 ("It is only *after* the claims have been *construed without*
 18 *reference to the accused device* that the claims, as so construed, are applied to the accused device
 19 to determine infringement." (emphasis in original)).

20 Because ADM's construction finds no support in the intrinsic evidence and because
 21 ADM's argument relies on irrelevant extrinsic evidence, the Court should decline to construe this
 22 term. *Silicon Graphics*, 607 F.3d at 798; *Halo Elecs.*, 721 F. Supp. 2d at 1004. Alternatively,
 23 the Court should adopt Bosch's construction, which is supported by the specification (e.g., Ex. C
 24 at Fig. 5; 7:10–11), and does not rely on extrinsic evidence. See *General Mills*, 103 F.3d at 981

25
 26¹³ See *AIA Eng'g Ltd. v. Magotteaux Int'l S/A*, 657 F.3d 1264, 1273 (Fed. Cir. 2011)
 27 (describing "inventor testimony" as "extrinsic evidence").
 28¹⁴ ADM's statement that Mr. De Block agreed that "a design such as ADM's does not use
 the *claimed* 'individual two bars,'" (ADM Br. at 9), is misleading. Mr. De Block made no
 reference to the claims of the patent. See D.I. 91 Ex. 8.

1 ("To ascertain the meaning of, or construe, patent claims, the intrinsic evidence of record should
2 be considered first, i.e., the patent itself, including the claims, the specification, and the
3 prosecution history." (citation omitted)).

4

5 **CONCLUSION**

6 For the reasons set forth above and in Bosch's Opening Brief, the Court should adopt
7 Bosch's proposed constructions where offered and decline to construe the remaining terms.

8

9

10 Dated this 16th day of December, 2011.

11 By: /s/ Marla DaVee

12 Todd M. Touton
Nevada Bar No. 1744
13 Marla DaVee
Nevada Bar No. 11098
14 LIONEL SAWYER & COLLINS
1700 Bank of America Plaza
15 300 South Fourth Street
Las Vegas, Nevada 89101
16 (702) 383-8888

17 Mark A. Hannemann
Jeffrey S. Ginsberg
Richard M. Cowell
19 KENYON & KENYON LLP
One Broadway
20 New York, NY 10004
21 (212) 425-7200

22 *Attorneys for Robert Bosch, LLC*

23
24
25
26
27
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Lionel Sawyer & Collins, and that on this 16th day of December, 2011, I caused to be served a true and correct copy of the foregoing **PLAINTIFF ROBERT BOSCH LLC'S RESPONSIVE SUPPLEMENTAL CLAIM CONSTRUCTION BRIEF** in the following manner:

(ELECTRONIC SERVICE) Pursuant to Fed. R. Civ. P. 5(b)(3) and LR 5-4, the above-referenced document was electronically filed and served upon the party listed below through the Court's Case Management and Electronic Case Filing (CM/ECF) system:

Michael D Rounds
Watson Rounds, PC
5371 Kietzke Lane
Reno, NV 89511

Russell E. Levine
Craig Leavell
Bryce Budin
Matthew Shiels
Kirkland & Ellis LLP
300 North LaSalle Street, 26th Floor
Chicago, IL 60654

/s/ Marla DaVee
LIONEL SAWYER & COLLINS